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No. 86-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF VERMONT,

Petitioner,

v.

RICK COX,

Respondent.

On Writ of Certiorari to the Supreme Court of Vermont

BRIEF OF PETITIONER

JEFFREY L. AMESTOY
Attorney General
SUSAN R. HARRITT
Counsel of Record
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05602
(802) 828-3171
Counsel for Petitioner

JOANNA A. MAUER
Assistant Attorney General
On the brief

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QUESTION PRESENTED

Whether the Fifth Amendment privilege against compelled self-incrimination is violated by the use of a defendant's unwarned statements in a presentence investigation report, when consideration of the statements at the sentencing hearing did not expose the defendant to an enhanced penalty or provide a basis for future prosecution of other crimes?

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BRIEF OF PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Vermont is officially reported at 147 Vt. —— and also appears at 519 A.2d 1144 (1986). The opinion is reproduced as Appendix A to the Petition for a Writ of Certiorari. Pet. App. 1a-7a. The order of the Supreme Court of Vermont denying the motion to reargue is reproduced as Appendix B to the Petition. Pet. App. 8a-9a.

JURISDICTION

The judgment of the Supreme Court of Vermont was entered on October 10, 1986. J.A. 1. A timely motion

to reargue was denied on November 3, 1986. J.A. 1. The Petition for a Writ of Certiorari was filed within ninety days of that date and was granted by this Court on February 23, 1987.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, wtihout due process of law. . . .

STATEMENT OF THE CASE

1. Summary

Following the entry of nolo contendere pleas to simple assault offenses, the district court ordered a probation officer to prepare a presentence investigation report ("PSI") on the defendant. At the subsequent hearing, defense counsel objected to the inclusion in the PSI of the defendant's statements to the officer on the grounds that the officer did not first inform the defendant of his Fifth Amendment rights and did not await the investigator from his attorney's office before proceeding with the interview. Counsel argued that the PSI report improperly conveyed to the sentencing judge incriminatory statements allegedly barred by constitutional guarantees. The Vermont Supreme Court, relying in part on *Estelle v. Smith*, 451 U.S. 454 (1981), concluded that the sentencing judge should not have considered the defendant's statements. The State of Vermont obtained review of that decision from this Court on a grant of certiorari on February 23, 1987.

2. Pertinent Factual Background

The defendant was initially charged by information with three felony counts of kidnapping in violation of a state statute, 13 V.S.A. § 2401. See J.A. 1, 2. The trial court judge found probable cause, J.A. 3, based on an affidavit which averred that the defendant had restrained three individuals for over two hours in an automobile against their will, had aimed a 9 mm pistol at two of the car's occupants, and had threatened to shoot them unless a monetary debt was paid. J.A. 4, 5.

Following plea discussions, the prosecutor moved to amend the felony charges, which carried a maximum period of incarceration of 25 years or a fine of $10,000 for each count, J.A. 2, to three misdemeanor counts of simple assault, which carried a maximum period of incarceration of 1 year or a fine of $1,000 for each count. See J.A. 7-8. The trial court granted the motion to amend and the defendant entered three pleas of nolo contendere to the simple assault charges.[1] See J.A. 1.

At the change of plea hearing held on December 9, 1983, the defendant was informed, pursuant to V.R.Cr.P. 11, that by pleading nolo contendere he had waived his privilege against self-incrimination. At that time, the court ordered a routine PSI report[2] for use by the court at sentencing. J.A. 1. The report was prepared and filed with the court. After defense counsel reviewed the PSI, she filed a letter protesting the consideration of the report by the judge at sentencing.

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[1] As noted in the decision below, both the federal courts and Vermont treat a plea of nolo contendere as equivalent to a plea of guilty. See Pet. App. 3a.

[2] The PSI report is prepared by a member of the Department of Corrections in accordance with 28 V.S.A. § 204 and V.R.Cr.P. 32. See Pet. App. 10a, 16a. The report is designed to assist the court "in imposing sentence or in granting probation or in the correctional treatment of the defendant . . . ." V.R.Cr.P. 32(c)(2). See Pet. App. 17a.

The letter was treated by the sentencing court as a motion to excise. The court reviewed the challenged material in the report and struck certain portions, such as the police officer's comments about the victims' fear of reprisal, J.A. 12, unverified or expunged convictions, J.A. 14, 16, and a reference to the defendant's membership in a gang. J.A. 15. The court, however, refused to excise other parts of the PSI, notably the statements from the defendant concerning his drug usage and trafficking. When the report was considered in its edited form, it contained admissions by the defendant regarding his personal and business dealings with drugs.[3] The report also contained a victim's statement reflecting the defendant's involvement and familiarity with drugs as a commercial venture.[4]

Although the trial court invited defense counsel to present evidence, defendant's attorney proffered no evidence regarding her objections to the defendant's "unwarned" statements.[5] The record at the sentencing hearing contained only the unsworn comments of defense counsel, the prosecutor, the judge, and, to a more limited degree, the probation officer. Counsel claimed, in effect, that the defendant was reluctant to speak with the probation officer because he was waiting for defense counsel's investigator to appear. J.A. 15. The defendant did

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[3] The report contains the following summary of statements made by the defendant at the interview: "Cox indicates he came to Vermont from Florida and had brought 2 oz. of Crystal meth with him (or rather sent it to himself via the mail). Cox states he also brought a gun with him." PSI at p. 2. "Cox indicates the money he had came from selling drugs and that he had come to Vermont from Florida to 'get rid' of the 'crystal meth' as he couldn't sell it in Florida." PSI at p. 3.

[4] One victim repeated statements the defendant made during the criminal episodes: "I'm going to shoot both of them too. He goes, this is business. This is the way they do it in business." PSI at p. 4.

[5] Defendant was incarcerated at the time of the PSI interview.

not ask that his attorney be present at the PSI interview. Counsel never argued that the defendant had claimed the Fifth Amendment privilege during the interview.

According to counsel's representations, the probation officer said that it would be fine if Cox chose not to talk with her but she said that the interview could not be postponed. J.A. 15. As reflected in the PSI report, Cox decided to speak with her.[6] No evidence was adduced either from the probation officer or the defendant regarding how the interview was conducted.

After hearing argument from counsel, the trial court questioned defense counsel about her role and responsibility in preparing the defendant for the PSI interview. J.A. 17. The court determined that information supplied by the defendant concerning criminal conduct was relevant to sentencing.[7] The court concluded that, apart from some minor deletions, the remainder of the report "[a]ppears essentially to be reliable information because it's either information [the probation officer] had or that the Defendant has given her," J.A. 19, and that the defendant's due process rights had been fully protected. J.A. 19. Defendant refused the court's invitation to speak on his own behalf. J.A. 21.

The State sought a sentence requiring the defendant to serve nine to twelve months on the first simple assault charge. On the second count, the State recommended a sentence of zero to six months to be served consecutively to the first sentence. On the third count, the State recommended a sentence of zero to six months to be served

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[6] If Cox had refused to be interviewed, the trial court could have dispensed with the PSI. V.R.Cr.P. 32(c)(1)(C).

[7] The sentencing judge opined that "this information could not only be beneficial to the State, could be beneficial to the defendant because it permitted the Court to set a rational sentence, and there could be a reasonable sentencing plan established when you're dealing with the whole individual rather than with some of the materials being hidden." J.A. 19.

concurrently with the second count. In all, the State sought a sentence of nine to eighteen months to be served. J.A. 22. Defense counsel urged the court to impose a sentence of six to nine months with credit for time already served; counsel also sought a special condition requiring drug treatment. J.A. 21. The court imposed a sentence of three consecutive terms of confinement, totalling eighteen months to three years. J.A. 24.

On appeal, the defendant raised a Fifth Amendment challenge. The Vermont Supreme Court struck his sentences and remanded the case for the preparation of a new PSI report and for resentencing. The Court reasoned that, since Fifth Amendment rights are retained by a defendant awaiting sentencing, the defendant may invoke the federal privilege against self-incrimination in order to prevent the possible "enhancement" of his sentence.[8] Pet. App. 4a. The Court also held that defendant's request to speak with an investigator was tantamount to a request for further legal advice. The Court further found that the officer conditioned the availability of the PSI interview on the defendant's waiver of his Fifth Amendment right to silence. The choice to continue with the non-mandatory PSI interview was found to have constituted a compulsion. Pet. App. 5a-6a.

SUMMARY OF ARGUMENT

Consideration by the sentencing court of the defendant's unwarned statements, contained in a presentence investigation report, does not violate the Fifth Amendment privilege against compelled self-incrimination. The privilege against self-incrimination is not violated in the absence of compulsion. The presentence investigation interview provides an opportunity for the defendant to present his version of the criminal offense and to describe his personal background, his motivations, and his special

[8] The Court, however, failed to discuss the nature of the "enhancement".

history. The inquiry is non-accusatorial and non-coercive. As the Court held in *Minnesota v. Murphy*, 465 U.S. 420 (1984), the defendant is under no more than a general obligation, not a compulsion, to cooperate with the probation officer at an interview. The interview setting does not coerce responses from the defendant in violation of the Fifth Amendment, particularly in Vermont where a defendant may choose not to participate.

Similarly, the consideration of the defendant's statements at sentencing does not violate the Fifth Amendment where there is no "enhanced" penalty. Here, after waiver of his right against self-incrimination, the defendant was adjudged guilty. At sentencing, the court considered the defendant's statements and imposed a sentence designed to fit both the crime and the defendant's needs. Where the government had no different burden of proof and where there was no greater penalty facing the defendant, the presentence investigation could not effect any "enhanced" punishment within the meaning of *Estelle v. Smith*, 451 U.S. 454 (1981). Since there was no earlier sentence, it logically follows that, despite the possibility of a higher sentence, there was no possible enhancement.

Unlike the defendant in *Estelle*, this defendant knew that the judge would review the statements he made to the probation officer during the presentence interview. The consideration of these comments is not an affront to the purposes the privilege addresses. Extension of the privilege against self-incrimination and the resultant loss of information from the defendant creates an unwarranted obstacle for the court that seeks to impose an individualized sentence. Likewise, correctional personnel are thwarted, in the absence of a complete presentence investigation, in their attempts to treat, classify, and release the defendant. Given the routine, non-accusatorial and non-mandatory nature of the report and the purposes of the Fifth Amendment, there is no constitutional

reason for the Court to disturb the current presentence investigation practice. Moreover, in light of the future remedies available to the defendant, there is no reason to require a recital of *Miranda* warnings by the probation officer at the presentence interview.

ARGUMENT

I. Without Compulsion, There Was No Violation Of The Fifth Amendment Privilege.

The Vermont Supreme Court erred when it held that the defendant's participation at the PSI interview was unconstitutionally conditioned on the forfeiture of his Fifth Amendment privilege. This view of the record misapprehends both the facts and the law. "Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be compelled to give evidence against himself." *Michigan v. Tucker*, 417 U.S. 433, 448 (1973). Defendant's statements to the probation officer were not compelled since he was merely given a choice of participation or refusal at the interview. Being asked to make a choice is not violative of the privilege against self-incrimination.

This Court has held that there is no Fifth Amendment harm in requiring a defendant to cooperate at an interview with a probation officer. *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984). The general obligation to appear before a probation officer and answer questions which could result in probation revocation or a subsequent prosecution is not a compulsion automatically calling for the recital of Miranda warnings. *Id.* at 427-429. A probationer, like an ordinary witness under subpoena who must answer or be held in contempt, is not under a compulsion to respond to questions unless he is required to answer over the valid claim of privilege.

Unlike the "penalty" cases, where "the state not only compelled an individual to appear and testify, but also sought to induce him to forego the Fifth Amendment privilege by *threatening* to impose . . . other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.' ", *Minnesota v. Murphy*, 465 U.S. at 434 (emphasis supplied), quoting from *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977), in this case, no such threat was made. Defendant never asserted his privilege against self-incrimination nor was he asked to forgo it.

The choice posed by the probation officer to the defendant presented no compulsion, since in Vermont the defendant can refuse to cooperate with the probation officer at the PSI stage. Pursuant to V.R.Cr.P. 32(c)(1)(C), the court may dispense with the PSI report if the defendant refuses to be interviewed by the probation officer. Refusal to cooperate, however, may result in a waiver of the right to challenge the accuracy in the report. If the defendant fails to correct any allegedly inaccurate material, he cannot challenge a sentence based on the contents of the report. *State v. Chambers*, 144 Vt. 377, 477 A.2d 974 (1984).

While the interview in Vermont is not mandatory, other courts have held that even a required interview does not constitute a compulsion. In *United States v. Jones*, 640 F.2d 284, 289 (10th Cir. 1981), the Court found that, despite the admonition by the trial court to the defendant to cooperate with the studies and interviews scheduled with a psychiatrist, there was no compulsion that rendered his subsequent statements involuntary. Since the government had no substantial reason to believe that the interview process would produce incriminatory disclosures, "[t]he statement of the court to cooperate is certainly not to be regarded as putting undue pressure upon the defendant to make statements which he otherwise would not make." 640 F.2d at 289.

The Fifth Amendment was not intended to "prohibit every element which influences a criminal suspect to make incriminatory admissions." *United States v. Washington*, 431 U.S. 181, 187 (1976). In the absence of any compulsion on the record, even "damning admissions" are not violations of the Fifth Amendment privilege. *Id.* at 187.

II. Where The Government Had No Different Burden Of Proof And Where There Was No Greater Penalty Facing Defendant, The PSI Could Not Effect Any "Enhanced" Punishment Within The Meaning Of *Estelle*.

Although the court sentenced the defendant to a term of incarceration in excess of the parties' recommendations, his sentence was not "enhanced" by the court's consideration of his statements in the PSI report. In view of the defendant's history and the seriousness of his actions while committing the three assaults, the sentence properly reflected what the trial court believed was an appropriate sentence. J.A. 19. On appeal, the Vermont Supreme Court vacated the sentence based on an erroneous interpretation of *Estelle v. Smith*, 451 U.S. 454 (1981).

The case at bar is distinguishable from *Estelle*. In *Estelle*, the defendant challenged, on Fifth Amendment grounds, the admission at the sentencing stage of *pretrial*, unwarned statements made to a psychiatrist. The statements were used by the government to meet its burden of proof at defendant's capital sentencing hearing regarding the element of "future dangerousness". Holding the Fifth Amendment privilege applicable to the "distinct" circumstances presented, the Court stated that the Fifth Amendment was implicated "because the State used as evidence against respondent the substance of his disclosure during the pretrial psychiatric examination." 451 U.S. at 465.

Unlike *Estelle*, the instant case involves no statements made prior to the voluntary entry of pleas of nolo contendere. Moreover, the defendant's statements were not utilized to prove any element of the offense. Even if consideration of the statements led to a lengthier sentence than would have been imposed in their absence, this result was not "enhanced" as that term was used in *Estelle*. Here, there was no prospect of any incremental increase in punishment, regardless of what was elicited from defendant. From the outset, the defendant faced the possibility that the court could sentence him to the maximum penalty simply by virtue of his having committed the offenses. In contrast, in *Estelle*, without his own incriminatory admissions, Smith was ineligible for the death sentence. Furthermore, since the government had no burden of proof at the sentencing hearing, the consideration of respondent's statements did not violate his privilege against self-incrimination. *See, Burch v. Indiana*, 450 N.E.2d 528, 530 (Ind. 1983).

The Vermont Supreme Court failed to state how defendant's sentence had been "enhanced". Assuming *arguendo*, that the sentencing court considered defendant's unwarned statements, the consequence of a more adverse sentence is nonetheless permissible. Certainly, admissions of drug trafficking are proper for a sentencing court's consideration because these comments reveal something about the personality of the defendant. Even if the court meted out a higher sentence because of the defendant's "lifestyle with regard to illicit drugs", J.A. 23, there is no constitutional violation despite the "more severe punishment." *Estelle v. Smith*, 451 U.S. at 475 (Rehnquist, J., concurring), quoting from *Hollis v. Smith*, 571 F.2d 685, 691 (2d Cir. 1978). Consideration of uncompelled statements resulting in an individualized sentence does not create an "enhancement."

Enhancement can arise in several contexts, all of which involve multiple proceedings. A sentence may be "en-

hanced", for example, upon resentencing, when a higher sentence is ordered. *Wasman v. United States*, 468 U.S. 559, 569 (1983). In another context, enhancement takes place when a different penalty replaces a period of incarceration. For example, instead of a term of years, the death penalty is imposed. *Estelle v. Smith*, 451 U.S. 454 (1981). Another illustration of enhancement appears in the repeat offender statutes.[9] Enhancement requires a base line, *i.e.*, once convicted, the defendant is subjected and exposed to a greater punishment if the government meets its burden of proof. In the instant case, there was no pre-existing base line. Here, the defendant had waived his right against self-incrimination. V.R.Cr.P. 11(c)(4). (Pet. App. 11a). His statements were included in a non-accusatory report and considered at sentencing for the crimes for which he had been adjudged guilty. Clearly, under these circumstances, there is no enhancement.

III. The Policy And Purposes Underlying The Privilege Do Not Support Its Application To The Presentence Interview.

A. *Aims Of The Privilege.*

This Court has described the aims of the privilege as a reflection of our most fundamental values. *See, e.g., Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964). The importance of the privilege, in light of its origins, evolution and function, is not questioned. *See*, 8 Wigmore Evidence §§ 2250, 2251 (McNaughton rev. 1961). However, the concerns of self-accusation, perjury, or contempt are not sacrificed in the post-adjudication stage. Attention to fair play or to the prevention of inhumane treatment is likewise not lost in the effort to provide a sentencing judge with a full and complete pic-

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[9] See, for example, 13 V.S.A. § 11 or 18 U.S.C. § 3575 and 21 U.S.C. § 849.

ture of the convicted defendant. None of the aims articulated in *Murphy* would be effectuated by an extension of the privilege to the PSI interview. Moreover, there are other constitutional guarantees which amply safeguard the defendant's interests at sentencing.[10] In the absence of abuses or coercion, Fifth Amendment interests would not be served by the blanket exclusion of the defendant's statements in the PSI.[11]

The State recognizes that, despite the waiver of the privilege as it concerns the underlying conviction, the privilege continues to apply to answers which might incriminate a defendant in future criminal proceedings, *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1975), or which might expose a defendant to an enhanced penalty. *Estelle v. Smith*, 451 U.S. 454, 463 (1980). However, the privilege should be applied only when there is compulsion and incrimination. "The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply." *Ullmann v. U.S.*, 350 U.S. 422, 431 (1956), quoting from *Hale v. Henkel*, 201 U.S. 43, 67 (1906). This Court has long said that the privilege is not dependent on the type of the proceeding,

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[10] A defendant has a due process right to be sentenced on accurate information, *United States v. Tucker*, 404 U.S. 443 (1972); to have the sentence comport with Eighth Amendment standards, *Trop v. Dulles*, 356 U.S. 86, 101 (1958); to have a sentence proportionate to the crime for which defendant has been convicted, *Solem v. Helm*, 463 U.S. 277, 284 (1983); and to have an attorney present at sentencing, *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

[11] See, W. Schaefer, *The Suspect and Society*, at 61 (1967) (the privilege is described as "a doctrine in search of a reason"); Henry J. Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cinn. L.R. 71 (1968); Dolinko, Is There a Rationale for the Privilege against Self-incrimination?, 33 UCLA 1063 (1986).

McCarthy v. Arndstein, 266 U.S. 34, 40 (1922), "but upon the nature of the statement or admission and the exposure it invites." *In re Gault*, 387 U.S. 1, 49 (1967).

In this case, the guilt phase of the prosecution had been completed upon the court's acceptance of defendant's pleas. The court ordered a PSI report at the change of plea hearing in anticipation of sentencing. There was no surprise resulting from the PSI interview, since defense counsel and the defendant were aware of this order. Defense counsel had had ample opportunity to meet with the defendant immediately after the change of plea hearing to discuss the implication of the PSI interview.[12] Under these circumstances, in light of the purposes of the privilege, the aims of sentencing, and the existence of future remedies, the defendant had no entitlement to the Fifth Amendment privilege.

B. *The PSI And The Individualized Sentence.*

The PSI interview of the defendant is designed to enable the court to fashion an individualized sentence by requiring the report to contain "any prior criminal record of the defendant and such information on his characteristics, his financial condition, and the circumstances affecting his behavior. . . ." V.R.Cr.P. 32(c)(2). (Pet.

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[12] The PSI report was ordered on 12/9/83. Sentencing was originally set for 1/11/84. The PSI is dated 1/18/84. The actual sentencing took place on 1/25/84. See original docket entries from district court and PSI report. (These items are not reprinted in the Joint Appendix.) 28 V.S.A. § 204(c) provides that, absent an extension from the court, the report must be prepared not more than three weeks from the date of order. No claim was ever made that there was inadequate time to meet with the defendant. A.B.A. standards place a duty on the defense attorney "to satisfy himself or herself that the defendant understands the nature of the presentence investigation process, and in particular the significance of statements made by the defendant to probation officer and related personnel." A.B.A. Standards for Criminal Justice, Sentencing Alternatives and Procedures § 18-6.3(f)(ii)(C) (vol. III 1980).

App. 16a-17a). The court relies upon a PSI and looks for the broadest information about a defendant's characteristics when it formulates an appropriate, individualized sentence.[13] *Wasman v. United States*, 468 U.S. at 563; *Williams v. New York*, 337 U.S. 241 (1949). In the federal PSI, the defendant's version of the offense is considered essential information.[14] Along with the federal system and standards proposed by national criminal justice institutions, Vermont advocates that a section in the report be based on a personal interview with the defendant.[15]

The function and purposes of the PSI cannot be completely effectuated without the defendant's explanation of the offense. Based on this and other material, the probation officer assesses the defendant's needs, and makes a recommendation for disposition. The PSI interview also provides an opportunity for the defendant to give his version of the offense and to offer mitigating circumstances. By advancing his view of the criminal episode, the report makes a significant contribution as a "personalized" document.

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[13] Indeed, considering how much more common it is that pleas are taken rather than trials held, the defendant's version in the PSI is oftentimes the only means by which the court can learn something about the defendant. *See*, Partridge, The Sentencing Options of Federal District Judges at 59 (Federal Judicial Center, June, 1985 rev.).

[14] United States Administrative Office of the U.S. Courts, *The Presentence Investigation Report*, Washington, D.C., U.S. Government Printing Office, 1984.

[15] *The Presentence Investigation Report*, see n.14, requires that the defendant be interviewed at least twice. Vermont recommends an initial interview and a follow-up interview, as necessary. Vermont Department of Corrections, *Procedures Manual*, The Presentence Investigation, Procedures. *See*, National Advisory Commission on Criminal Justice Standards and Goals. *Corrections*, § 5.14. *See*, by implication, A.B.A. Standards on Criminal Justice, Sentencing Alternatives and Procedures § 18-5.1, Commentary (vol. III 1980).

Additionally, if the defendant is ordered to serve a sentence, the interview and the PSI aid in classification and selection of programming. The PSI provides probation departments with a source of information for the development of supervision and implementation of the recommended case-plan, if the offender is placed on probation, and is of equal assistance to the paroling authority in its decision-making process. The report is also used by other treatment agencies and appellate courts in sentencing review.

If the state court's decision is allowed to stand, many problems for the criminal justice system can be anticipated. The PSI may follow the defendant from the sentencing courtroom to the probation officer, to the correctional facility, and to parole board hearings. With limitations on information in the PSI, judicial and correctional officers will be hampered in making sentences, assessments, case-plans and recommendations, which, in turn, will effect the release and reintegration of the defendant in society.

C. *Future Remedies.*

If incriminating material is revealed during the PSI interview, it is by no means certain that there will be a subsequent prosecution derived from these admissions.[16] If a charge does arise, at that time the accused could assert his Fifth Amendment privilege through a suppression or dismissal motion and put the burden on the government to show "that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Murphy v. Waterfront Commission*, 378 U.S. at 79 n. 18 (1963). See *Kastigar v. United States*, 406 U.S. 441, 460 (1972). Knowledge that the privilege could be asserted subsequently encour-

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[16] The defendant has not been prosecuted for any other offenses described in the PSI.

ages the broadest possible array of information for judicial consideration at sentencing.[17]

This protection scheme has been cited with approval in an analogous context:

> [T]he purpose of the examination is not to bypass the adversary system and extract incriminating statements from the defendant to be used against him in a subsequent criminal proceeding. The clear purpose is to evaluate the prisoner so that he may be assigned to the appropriate institution at the appropriate custody level with a basic program plan for treatment that fits his rehabilitation and training needs. In this context, Taylor's right to be free from self-incrimination did not arise. Only if the state attempted to use the evaluation in a subsequent criminal proceding would Taylor's right to assert the Fifth Amendment be triggered. *See, Estelle v. Smith*, 451 U.S. at 462-65, 101 S.Ct. at 1872-74. At that time, Taylor would be entitled to have the evaluation suppressed if its content were offered against him and if Taylor had not otherwise waived the right.

Taylor v. Best, 746 F.2d 220, 224 (4th Cir. 1984). Where the privilege against self-incrimination may be successfully invoked in the future, there is no reason to block disclosure of reliable information helpful to the court in making an informed sentencing decision, once a judgment of guilty is entered.

IV. The Fifth Amendment Privilege Against Self-Incrimination Was Not Intended To Impede The Flow Of Information Used At Sentencing.

Consideration of the defendant's statements in the routine PSI by the sentencing judge does not automatically require the protections afforded by the Fifth Amendment

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[17] Of course, there must be a case-by-case review of any Fifth Amendment claim because incriminatory information may also be volunteered and not compelled. *Garrity v. New Jersey*, 385 U.S. 493, 499 (1967).

privilege. As stated in *Estelle*, 451 U.S. at 469 n. 13, "Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination."

When the purpose for the interview and the gathering of information is non-accusatory, there is no violation of the privilege against self-incrimination. Even if the information from the defendant is private and personal in nature, the Fifth Amendment is not a bar to the acquisition of defendant's statements, because the statements are not sought for an incriminatory purpose. "[T]he Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which in the Court's view, did not involve compelled testimonial self-incrimination of some sort." *Fisher v. United States*, 425 U.S. 391, 399 (1975).

Courts have consistently looked to the reason underlying the collection of the defendant's statements to determine the application of the privilege. For example, in *Baumann v. United States*, 692 F.2d 565 (9th Cir. 1982), the court noted that:

> there is a substantial difference between a psychiatric examination of the defendant in a capital case which seeks to elicit evidence from the defendant relating to the critical aggravating factor of dangerousness, and a "routine" presentence interview, *see Estelle, supra*, 451 U.S. at 465, 101 S.Ct. at 1874, restricted to gathering information upon which the district court, in its discretion, may rely when imposing sentence.

692 F.2d at 576.

The *Bauman* court read *Estelle* narrowly and limited its holding to those cases involving the distinct circumstances of a bifurcated proceeding. The court reasoned that, since the government has no burden of proof at sentencing, the

PSI should not be circumscribed without constitutional justification.

Collection of evidence from an accused in a court-ordered psychiatric examination for competency, or in a routine PSI interview, for use at sentencing, should not be limited since the defendant ordinarily faces no threat of incrimination or compulsion. In *Estelle*, for example, it would have been entirely proper to order a psychiatric exam of a defendant if the exam were restricted to a routine competency determination. *Id.* at 465. *See, also, Hollis v. Smith*, 571 F.2d 685, 691 (2d Cir. 1978) (psychological questioning "did not involve compelled testimonial incrimination"); *State v. Mercier*, 128 N.H. 57, ——, 509 A.2d 1246, 1250 (1986) (the non-incriminating use of testimonial evidence derived from an exam removes case from the ambit of *Estelle's* prohibition); *Selby v. Shulsen*, 600 F.Supp. 432 (D. Utah 1984) (psychiatric testimony used at the penalty phase to establish defendant's mental condition did not violate privilege against self-incrimination); *Gibson v. State*, 110 Idaho 631, 639, 718 P.2d 283, 290 (1986) (no Fifth Amendment violation when the psychiatric testimony formed no part of the finding of aggravating circumstances.) "Compelled" psychological examinations which elicit incriminating statements do not violate Fifth Amendment principles, as long as the statements are not utilized to establish culpability or responsibility.

When the purpose for gathering the defendant's statements relates to the legitimate goals of sentencing, the consideration of these comments in the PSI is consistent with the Fifth Amendment. In *United States v. Gonzalez-Mares*, 752 F.2d 1485 (9th Cir. 1985), that court held that, since the accused's responses to questions posed in a pre-plea interview by a probation officer were used solely for the oral presentence report and not in the underlying prosecution, the privilege against incrimination was not infringed:

> After conviction, the danger of introducing responses to a probation officer's questions at the trial for the underlying offense is virtually nonexistent. The only use for such responses would be for revocation of parole or probation based on prior convictions or discovery of new or additional offenses not yet charged. The former use is not incriminatory under the Fifth Amendment; the latter use must be evaluated on a case by case basis to see if the question was likely to elicit an incriminatory response. *Jones v. Cardwell*, 686 F.2d 754 (9th Cir. 1982).

752 F.2d at 1490.

In this case, the interview was part of the routine PSI process, as required by Rule 32 of the state and federal criminal rules, and, as a result, the inclusion of the defendant's statements was proper.

V. Miranda Warnings Are Not Required In The Non-Coercive Presentence Investigation Interview.

While the Vermont Supreme Court decision does not expressly mandate the *Miranda* warnings prior to a PSI interview, the import of this opinion is inescapable. The court held that the defendant's Fifth Amendment privilege had been violated. The court's erroneous recognition of the defendant's constitutional right to remain silent at the PSI interview creates the requirement of a warning and, in return, a waiver before the interview can take place. Constitutional rights must be knowingly, intelligently, and voluntarily waived. *Miranda v. Arizona*, 384 U.S. 436, 444 (1986). Under the Vermont Supreme Court's rationale in this case, the probation officer becomes a police officer responsible for explaining warnings and ascertaining waivers.

In *Miranda v. Arizona, supra*, the Court established procedural safeguards in order to prevent the subjugation of the individual to the will of his examiner in inherently coercive circumstances. Since the policy con-

cerns which produced those prophylaxes are not implicated by a post-adjudication interview by a probation officer for a PSI, there is no reason to administer the warnings.

The expansion of the *Miranda* decision to the post-adjudication defendant is wholly unwarranted. In *Minnesota v. Murphy*, 465 U.S. at 470, the Court observed that "the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." The Court found that the probation interview was vastly different from an interview of a suspect by a police officer. Like the interview process in *Minnesota v. Murphy*, *supra*, a post-adjudication defendant knows he will be interviewed by a probation officer about his past and his view of the offense. The defendant expects and anticipates both the interview and questions from the probation officer. The interview is finite in scope. In the case at bar, the defendant was told he did not have to speak at the interview. J.A. 15. The appointment of counsel with whom respondent could have conferred suggests comparisons to the counselled taxpayer in *Garner v. United States*, 424 U.S. 648, 658 (1975), who was similarly not entitled to *Miranda* warnings in the absence of psychological pressures. The PSI interview presents none of the pressures sought to be minimized by the imposition of *Miranda* warnings.

Even if *Miranda* warnings were required at a pretrial competency examination, they are of no benefit once the defendant has pled and is being interviewed as a routine part of the sentencing process. At this non-accusatory stage, it is important that the defendant have the opportunity to convey information upon which the probation officer can form "an accurate appraisal of a defendant's social and criminal history and a recommendation for beneficial rehabilitative treatment which will best modify a defendant's behavior to conform to society's

requirements." *State v. Cawley*, 133 Ariz. 27, 28, 648 P.2d 142, 143 (1982). If, as a result of this process, damaging material is elicited and if it is used in a future prosecution, then the defendant has available a suppression or dismissal motion as a means of asserting his Fifth Amendment rights.

In *State v. Knapp*, 111 Wis.2d 380, 386, 330 N.W.2d 242, 245 (1983), that court noted the significant distinctions between a presentence investigation, the pre-trial competency examination, and the stationhouse interrogation:

> [P]re-sentence reports are designed to gather information concerning a defendant's personality, social circumstances and general pattern of behavior, so that the judge can make an informed sentencing decision. The interview does not involve the accusatorial atmosphere characterized by the stationhouse confrontation in *Miranda* or the psychiatric examination on "future dangerousness" at issue in *Estelle*. Therefore, the *Miranda* safeguards should not be required.

State v. Knapp, 111 Wis.2d at 386, 330 N.W.2d at 245.

Other courts have specifically recognized that application of *Miranda* warnings to the PSI interview is both without legal justification and likely to thwart the purpose of information gathering. ". . . *Miranda* has never been applied, to our knowledge, to routine pre-sentence interviews conducted for the benefit of a district judge in the exercise of his substantial discretion at sentencing. We see no reason to do so." *Baumann v. United States*, 692 F.2d at 576. The *Baumann* court stated that the safeguards cannot be divorced from the practical concerns and policy considerations which gave rise to the *Miranda* decision.

In the absence of the compelling pressures experienced by a suspect in a confrontation with a law enforcement officer, the warnings are not required even if the inter-

view is technically a custodial interrogation. "To require *Miranda* warnings before such routine pre-sentence interviews, therefore, would be to apply a principle 'broader than that required to implement the policy of Miranda itself.'" *Baumann v. United States*, 692 F.2d at 577, quoting from *United States v. Booth*, 669 F.2d 1231, 1237 (9th Cir. 1981). *See*, also, *State v. Heffran*, 129 Wis.2d 156, 166, 384 N.W.2d 351, 355 (1986); *Burch v. Indiana*, 450 N.E.2d 529, 530 (Ind. 1983); *Trimmer v. State*, 651 S.W.2d 904 (Tex. App. I Dist. 1983); *Booth v. Commonwealth*, 675 S.W.2d 856, 859 (Ky. 1984); *People v. Bachman*, 127 Ill. App. 3d 179, 185, 468 N.E. 2d 817, 822 (1984).

The report and the interview process are beneficial to the defendant because, as a consequence, a sentence will be tailored to fit the defendant's own special needs and circumstances. As the lower court recognized, see J.A. 19, "the pre-sentence interview is a stage that is designed to aid the defendant, rather than hurt him. The purpose of *Miranda* would not be served if we were to extend its application to the pre-sentence interview." *Commonwealth v. Burton*, 451 Pa. 12, ——, 301 A.2d 675, 677 (1973). Similarly, in *People v. Santana*, 184 Cal. Rptr. 733, 134 Cal. App.3d 773 (1982), the court observed that the purpose of the personal interview is

> to assist in developing mitigating factors as well as aggravating ones. A defendant cannot have it both ways. He knows or should know that information he gives the probation officer of a favorable nature will find its way into the report. He cannot expect that adverse information can be kept out by later claiming that he was not given an adequate warning of his constitutional rights.

People v. Santana, 184 Cal. Rptr. at 739-40, 134 Cal. App. 3d at 786.

In the instant case, the same positive factors attend the PSI interview. The defendant waived his right to

trial and his privilege against self-incrimination when the court accepted his pleas of nolo contendere to the three counts of simple assault. See V.R.Cr.P. 11(c)(4). He was already represented by a lawyer and had consulted with her. Both he and his attorney knew a PSI report had been ordered at the change of plea hearing. The interview with the probation officer and the scope of the inquiry came as no surprise.[18] Under these circumstances, *Miranda* warnings serve no useful purpose.[19]

The Court has recognized that *Miranda* warnings should not extend beyond "the context of the inherently coercive custodial interrogation for which it was designed." *Roberts v. United States*, 445 U.S. 552, 560 (1980). *Miranda* warnings were not designed by the Court with either psychiatric examinations, *see*, *Estelle v. Smith*, 451 U.S. at 475 (Rehnquist, J., concurring), or presentence investigation reports in mind. "Respondent was simply not in the inherently coercive situation considered in *Miranda*. He had already been indicted, and counsel had been appointed to represent him." *Id.* A formalistic recital of *Miranda* warnings should not be the required first step in a PSI interview.

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[18] The parameters of the report are clearly spelled out in Rule 32 of the state and federal criminal rules.

[19] The *Miranda* decision acknowledges that other formulations may be used in place of the litany of rights if the other procedures "are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Miranda*, 384 U.S. at 467. Here, the probation officer told Cox he did not have to talk with her. J.A. 15. In effect, he was told he could be silent and bring the interview to an end.

CONCLUSION

For the reasons stated above, the decision of the Supreme Court of Vermont should be reversed.

Respectfully submitted,

JEFFREY L. AMESTOY
Attorney General
SUSAN R. HARRITT
Counsel of Record
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05602
(802) 828-3171
Counsel for Petitioner

JOANNA A. MAUER
Assistant Attorney General
On the brief

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